UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

ENVIRONMENTAL PROTECTION INFORMATION CENTER, ET AL.,

Plaintiffs,

v.

UNITED STATES FOREST SERVICE,

Defendant.

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No. C-02-2708 JCS

FINDINGS OF FACT AND CONCLUSIONS OF LAW RE LIABILITY [Docket Nos. 15 and 31]

I. INTRODUCTION

Plaintiffs Environmental Protection Information Center and American Lands Alliance filed a complaint against the United States Forest Service on June 6, 2002, asserting a single claim under the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq.*, based on the Forest Service's failure to prepare an Environmental Assessment or an Environmental Impact Statement in connection with the issuance of the Six Rivers National Forest Fire Management Plan. Plaintiffs filed a Motion for Partial Summary Judgment ("Plaintiffs' Motion") and Defendant filed a cross-motion for summary judgment ("Defendant's Motion"). Notwithstanding the titles of the Motions, in a stipulation filed April 10, 2003, the parties agreed that the Court would make a final decision on the merits based on the written submissions presented with the Motions, and waived the right to call live witnesses at the trial. The liability phase of the case was argued on July 18, 2003. The Court now enters this Order as its Findings of Fact and Conclusions of Law re: Liability under Rule 52 of the Federal Rules of Civil Procedure. For the reasons set forth below, the Court finds for Plaintiffs and against Defendant on liability and concludes that Defendant violated NEPA by failing to prepare an Environmental Impact Statement or an Environmental Assessment in connection with the issuance of the Six Rivers National Forest Fire Management Plan.[1]

II. BACKGROUND

A. Facts

Six Rivers National Forest ("Six Rivers" or "the Forest") is located in northwestern California and encompasses almost one million acres of forest land. Final Environmental Impact Statement: Six Rivers National Forest Plan ("FEIS") at S-1, List of Appendices To Defendant's Motion for Summary Judgment and in Opposition to Plaintiff's Motion for Summary Judgment ("Appendices"), Exh. C. Nearly one quarter of Six Rivers constitutes old-growth or late-mature forest habitat. *Id*. at III-27. The Forest provides wildlife habitat for threatened and endangered species, including the bald eagle, peregrine falcon, and the spotted owl. *Id.* at S-4.

Pursuant to the requirements of the National Forest Management Act ("NFMA"), 16 U.S.C. § § 1600 *et seq.*, Six Rivers adopted a Land Resource Management Plan ("LRMP") in 1995. *See* Appendices, Exh. B (LRMP). The LRMP is a long-term planning document that sets general standards and guidelines for the management of the Forest for a ten to fifteen year period. *Id*. at I-1. The NFMA requires that an LRMP be prepared in accordance with NEPA requirements, which includes preparation of an Environmental Impact Statement (EIS). *See* 16 U.S.C. § 1604(d). Thus, prior to adopting its final LRMP, Six Rivers prepared an EIS to evaluate the potential environmental impact of the standards and guidelines adopted in the LRMP. *See* Appendices, Exh. C (FEIS).

In the Six Rivers LRMP, fire management is addressed in a section entitled "Fire/Fuels Management." LRMP at IV-116 to IV-117, Appendices, Exh. B. That section sets the goal of providing "well-planned and well-executed fire protection and fuel management programs (including fire use through prescribed burning) that are responsive to land and resource management

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[1] Alternatively, the Court GRANTS Plaintiffs' Motion and DENIES Defendant's Motion. The parties agreed at oral argument that there are no disputed issues of material fact. All of the material facts set forth in Section II.A, below, are undisputed. Based on these facts, and the legal analysis in Section III, below, the Court concludes that Plaintiffs are entitled to judgment as a matter of law that Defendant violated NEPA by failing to prepare an Environmental Impact Statement or an Environmental Assessment before issuing the Six Rivers National Forest Fire Management Plan.

objectives."[2] *Id*. at IV-116. However, the next subsection, entitled, "Direction," makes clear that these programs are not addressed in the LRMP, but rather, are to be set forth in a future Fire Management Action Plan. *Id*. In particular, the LRMP states that "a Forest-wide Fire Management Action Plan will be developed that describes and analyzes the current and potential fire and fuels situation on the Forest." The LRMP continues, "[s]trategies for future fire and fuels management will also be developed as part of this action plan." *Id.*

The LRMP lists eleven general Standards and Guidelines relating to fire and fuels management. *Id*. at IV-116 to IV-117. One of these states that "[p]rescribed fire will be used in natural fuels treatment for various benefits . . . ." *Id.* at IV-117 (Guideline 14-4). The LRMP does not, however, set forth any details concerning the circumstances under which prescribed fire is to be used. Similarly, Guideline 14-6 envisions Wildland Fire Use ("WFU")[3] as a fire management tool but defers to the future fire management plan on the circumstances under which WFU might be used, stating:

> Naturally ignited fires may be managed as prescribed fires, as determined on a case-by-case basis through an assessment of hazard and risk and the direction found in the area specific fire management plan.

Id. Pending adoption of the fire management plan, Guideline 14-1 specifies that "[a]ll wildfires will receive a fire suppression response . . . ." *Id*.

The LRMP also contains some guidelines addressing fire and fuels management in particular management areas of the Forest. For example, the LRMP states that for all wilderness (Management Area 1), "'contain' and/or 'control' strategies" are to be used "[u]ntil approval of the Forest Fire Management Action Plan and the individual Wilderness Fire Management Strategies." *Id*. at IV-12. For Special Interest Areas (Management Area 10), the LRMP states that "prescribed fire may be

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[2] "Prescribed burning" is the ignition of a fire, pursuant to a "Prescribed Fire Plan," to regulate fuels and maintain healthy ecosystems. *See* Wildland and Prescribed Fire Management Policy at Bates Stamp Nos. 1471-1472, Exh. G to Schmidt Decl.

[3] Plaintiffs define Wildland Fire Use as allowing "naturally ignited fires to burn under very restricted conditions." Plaintiffs' Memorandum of Points and Authorities at 5. The Forest Service does not challenge this definition.

used as a management tool." *Id*. at IV-51. For the General Forest (Management Area 17), the LRMP states that "[w]ildfires will be suppressed" and that "[m]anagement related fuels will be treated so as to be consistent with wildlife habitat needs as described in Forest-wide Standards and Guidelines." *Id*. at IV-63. In the section entitled "Vegetation," the LRMP states that "[v]egetation will be managed to reduce risk of fire . . ." and continues, "[p]rescribed fire and commercial thinning will be utilized to the extent practicable, to reduce fuel loading, control species composition and stand density." *Id*. at IV-77. Finally, the LRMP addresses Port-Orford-cedar ("POC") root disease in two sections. *Id*. at IV-129 ("Port-Orford Cedar Root Disease") and Appendix K (Port Orford Cedar Action Plan). Those sections do not, however, address POC root disease in connection with fire and fuels management.

The Six Rivers Fire Management Plan ("FMP") – the Fire Management Action Plan that was envisioned in the LRMP – was approved in June 2001. The Executive Summary states that the FMP "does not make decisions; rather it provides the operational parameters necessary for LRMP implementation." FMP at ix, Exh. D to Declaration of Brian A. Schmidt in Support of Plaintiffs' Motion for Partial Summary Judgment ("Schmidt Decl."); *see also id.* at I-II (stating that "[t]he Fire-Management Plan is not a decision-making document"). At the same time, the FMP acknowledges that it not only "recogniz[es] LRMP direction [but also] goes beyond that direction in its interdisciplinary analysis and identification of priority fuels treatment areas." *Id*. at I-I; *see also id.* at I-1 (explaining that the FMP identifies "ten large fuel treatment areas" which "may generate future fuels management projects strategically").

The FMP also goes beyond the LRMP in a number of other respects. For example, the FMP addresses POC root disease risk reduction in the context of fire and fuels management. *See id.,* Appendix F. In particular, in Appendix F, the FMP sets forth "POC Guidelines and Management Recommendations." One of the management recommendations allows water that may be infected with POC root disease to be used in fire suppression if the water is treated with bleach. *Id*. An attachment to Appendix F specifies the proper concentration of bleach, the types of bleach that may be used, and the proper procedures for adding bleach. *Id*. Another management recommendation authorizes Forest Service officials on a case-by-case basis to open for "administrative purposes" roads that have been closed to prevent the spread of POC root disease. *Id.* The FMP states that "Forest Service employees, cooperators and contract workers should adhere to these guidelines when operating in areas with POC on this Forest." *Id*. at III-5. In addition, Table 19 states "no exemption" is available from the POC "risk reduction practices." *Id*. at IV-24.

Another area which is addressed in greater detail in the FMP is WFU. As noted above, the LRMP includes a guideline stating that WFU will be permitted "on a case-by-case basis through an assessment of hazard and risk and the direction found in the area specific fire management plan." LRMP at IV-117, Appendices, Exh. B. The FMP provides the "direction" concerning WFU that is envisioned in the LRMP. In particular, the FMP establishes detailed criteria to guide decision-making in determining whether WFU is appropriate. FMP at IV- 2 to IV-12, Exh. D to Schmidt Decl. Among other things, the FMP lists "threshold" Energy Release Component ("ERC") levels for determining whether WFU is appropriate, *id*. at IV-5, and prohibits WFU during Preparedness Level V. *Id*. at IV- 4.

The FMP also makes some specific determinations that are not included in the LRMP regarding fire suppression. For example, the FMP states that "[a]ggressive suppression actions should be used when controlling major wildland fires within the Highway 199 corridor, to reduce the risk of highway closures." *Id*. at III-33.

Finally, the FMP lists the specific fire suppression strategies and tactics which may and may not be used in each type of management area, as well as the level of authority required to obtain an exemption from these rules. *Id*. at IV-25 to IV-26 (Table 19). For example, the FMP provides that in Wilderness areas, no chain saws, portable pumps, helicopters, heavy equipment or vehicular ground transport may be used without approval of the Forest Supervisor or Regional Forester. *Id*. Limits are also placed on fire suppression methods used in Research Natural Areas, Native American Contemporary Use Areas and Special Habitat. *Id*. As noted above, the FMP also requires compliance with POC risk reduction practices and allows for no exemptions. *Id*.

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The Forest Service did not complete an Environmental Assessment ("EA") or an Environmental Impact Statement ("EIS") in connection with the FMP.[4]

B. Procedural Background

Plaintiffs filed a complaint against the Forest Service on June 6, 2002, asserting a single claim under NEPA and § 706 of the Administrative Procedures Act ("APA"), based on the Forest Service's failure to prepare an EA or EIS in connection with the issuance of the Six Rivers FMP. Plaintiffs sought declaratory and injunctive relief. Plaintiffs filed a motion for partial summary judgement on March 16, 2003, asking the Court to issue a judgment finding the Forest Service liable for failure to prepare an EIS or EA. On April 9, 2003, both parties agreed to submit the case for final decision on the merits on the written papers only. On May 9, 2003, the Forest Service filed a cross-motion for summary judgment seeking dismissal of Plaintiffs' complaint, in its entirety, on the basis that the Forest Service was not required to prepare an EA or EIS in connection with completion of the FMP. The parties stipulated at oral argument on the Motions that there are no disputes as to the material facts and that the Motions turn on a purely legal question.

C. The Motions

The primary issue raised by the Motions – and the primary issue to be determined in the liability phase of this case – is whether the FMP is a decision-making document, and if it is, whether it includes any "new" decisions that trigger the requirement to complete either an EIS or an EA.[5] Plaintiffs assert that the FMP includes "new and detailed fire management direction" and therefore, constitutes a proposal for major federal action requiring NEPA analysis. The Forest Service, on the other hand, argues that the FMP is not a proposal for major federal action because "it does not make any decisions." Opposition at 19; *see also id.* at 18 (stating that "the Fire Plan, alone, does not *do anything*. Nor does it, alone, strictly require or prohibit any action on the forest")

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[4] An EA is less exhaustive than an EIS and may be completed to determine whether or not an action is likely to have a significant environmental impact and therefore require completion of an EIS. *See Native Ecosystems Council v. Michael*, 304 F.3d 886 (9th Cir. 2002); *see also* 40 C.F.R. §§ 1501.4(b), 1508.9.

[5] At oral argument, the parties stipulated that they are not asking this Court to determine *which* of these two documents is required. Rather, they ask the Court to determine only whether the FMP triggers the requirement under NEPA that one or the other be completed.

(emphasis in original). Further, the Forest Service argues that this Court does not have subject matter jurisdiction over Plaintiffs' claim because the FMP does not constitute "final agency action" under § 702 of the Administrative Procedures Act ("APA").[6]

III. ANALYSIS

A. Legal Standard

The Forest Service's decision not to prepare an EIS must be upheld unless the decision was unreasonable. *Northcoast Environmental Center v. Glickman*, 136 F.3d 660, 667 (9th Cir. 1998). Factual or technical decisions by an agency are given greater deference under the arbitrary and capricious standard. *Id.* However, because the threshold question of NEPA applicability is primarily a legal question, the less deferential "reasonableness" standard applies in this case. *See id.*

B. Final Agency Action

As a preliminary matter, this Court must determine whether there is subject matter jurisdiction over Plaintiffs' complaint. Plaintiffs assert that this Court has subject matter jurisdiction pursuant to § 702 of the APA, 5 U.S.C. § 702. Defendant, however, argues that this Court does not have subject matter jurisdiction over Plaintiffs' claim because the FMP is not a "final agency action," as is required under § 704 the APA. The Court concludes that the FMP is a "final agency action" and therefore, that it has subject matter jurisdiction over Plaintiffs' complaint.

Section 702 provides, in part, that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. Section 704 provides that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." 5 U.S.C. § 704. Reading these sections together, courts have held that an "agency action" under § 702 must be a "final agency action." *Lujan v. Nat'l Wildlife Foundation*, 497 U.S. 871, 882 (1990). In *Bennett v. Spear*, 520 U.S. 154 (1997), the Supreme Court articulated a two-part test for determining whether there is "final agency action:"

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[6] Although Plaintiffs invoked only § 706 of the APA as the basis for jurisdiction in their Complaint, Plaintiffs stipulated at oral argument that they are, in fact, asserting their NEPA claim under § 702 *and not* under § 706 of the APA. Because the Forest Service raised no objection, the Court deems Plaintiffs' Complaint amended to assert their claim under § 702 of the APA.

> First, the action must mark the "consummation" of the agency's decisionmaking process, . . . it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which "rights or obligations have been determined," or from which "legal consequences will flow."

Id. at 177-178 (citations omitted).

The Forest Service argues that the FMP is not the consummation of the agency's decision-making process because it does not make any "firm decisions" and does not "require or prohibit any actions." Defendant's Motion at 15. Thus, the "consummation" of the decision-making process will not occur, the Forest Service argues, until some site-specific project is undertaken, such as a local decision to thin a stand of trees or suppress a particular wildfire. *Id*. at 16. The Forest Service argues further that because the FMP merely provides information and recommendations, no legal consequences flow from the document. *Id*. at 18. The Court concludes that Forest Service's position is not supported by the case law addressing final agency action.

First, on the question of whether the FMP is the "consummation of the agency's decisionmaking process," the Court finds that with respect to a number of issues addressed in the FMP, it is. *See Bennett*, 520 U.S. at 177-178. While the FMP admittedly contains a great deal of information to guide decision-makers, it also makes programmatic decisions regarding strategies and methods that are to be used in the Forest in the area of fire management. Three examples of such decisions will suffice to demonstrate this point: POC root disease, WFU and fire suppression.

With respect to POC root disease risk reduction, the FMP makes at least two decisions. First, the FMP authorizes the use of water that is potentially infected with POC root disease in fire suppression if bleach is added to the water in amounts specified in the guidelines. FMP, Appendix F at 3, Exh. D to Schmidt Decl. Second, the FMP allows the District Ranger to open roads that have been closed to control the spread POC root disease for "administrative purposes," presumably, fire suppression and fuels management. *Id*. at 1. Neither of these decisions is contained in the LRMP, which makes no mention of opening roads that have been closed to avoid the spread of POC root

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disease or using bleach-treated water that may be infected with POC root disease for fire management.

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Each of these decisions is the "consummation of the agency decision making process." The agency has now authorized, for the first time, on a programmatic basis, the use of two potential vectors of POC root disease in fire suppression: water and roads. Moreover, the agency specified the circumstances under which the use of these vectors is authorized for fire suppression. In particular, with respect to the use of potentially infected bleach treated water, the agency specified the type of bleach that may be used and the concentration of bleach to be used. As to the opening of roads in POC-infected areas for fire suppression, the agency specified that such actions may be taken on the authorization of the District Ranger.

On the issue of WFU, the FMP also establishes at least two new policies to be followed by Forest Service officials. First, the FMP states that "five fire preparedness levels have been defined and are declared." *Id*. at IV-4. The FMP specifies that WFU may be used during preparedness levels I through IV but that WFU "*will not* be initiated during preparedness level V." *Id*. at IV- 4 (emphasis added). Second, the FMP sets threshold Energy Release Component ("ERC") levels. *Id*. at IV- 5. At oral argument, the Forest Service did not dispute that when these thresholds are exceeded, WFU is an inappropriate response under the FMP. Neither of these decisions is contained in the LRMP. Rather, these decisions are examples of the "direction" envisioned in the LRMP. *See* LRMP at IV-117, Appendices, Exh. B (WFU may be used if it is consistent with the "direction found in the area specific fire management plan"). These decisions too are the consummation of the agency's decision making: they restrict the use of WFU under certain circumstances.

In the area of fire suppression, the FMP makes another new decision, adopting for the first time a policy of taking "aggressive fire suppression actions . . . when controlling major wildland fires within the Hwy. 199 corridor." *Id*. at III-33. The FMP also makes decisions about the types of fire suppression methods that can be used in particular areas of the forest. *Id*. at IV-25 to IV-26. For example, for Special Habitat Areas, the FMP allows the Incident Commander or District Ranger to grant exemptions from restrictions such as the prohibition on Helispot construction in such areas. *Id*.

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Second, the decisions identified above "determine rights and obligations," and thus have "legal consequences," because they purport to be binding on Forest Service officials. *See Bennett*, 520 U.S. at 177-178. With respect to POC root disease, the FMP expressly states that "Forest Service employees, cooperators and contract workers should adhere to" the POC guidelines contained in Appendix F of the FMP. FMP at III-5. For this reason, the Court rejects the Forest Service's argument that these policies are not mandatory because they are called "management *recommendations*." *See* Opposition at 27 (emphasis added). The Court's conclusion is further supported by Table 19 of the FMP, which allows "no exemption" from the "direction" for management areas containing POC, which states, "[c]omply with Port Orford cedar risk reduction practices." *Id*. at IV-24 (Table 19).[7]

Similarly, as to WFU, there is no indication in the FMP that Forest Service officials are permitted to disregard the threshold ERC levels for WFU or the prohibition on WFU at Preparedness Level V. As to the Preparedness Level policy, this is particularly evident from the language used in the FMP, which states that "WFU *will not* be initiated at Preparedness Level V." *Id*. at IV- 4 (emphasis added). This language cannot reasonably be read as a mere recommendation. Nor can the decision in the FMP that "aggressive fire suppression actions should be used when controlling major wildland fires within the Hwy 199 corridor" be reasonably construed as merely a non-binding recommendation that Forest Service officials may disregard. *See id.* at III-33.

The cases on which the Forest Service relies in support of the assertion that the FMP is not a final agency action are not on point. In *Franklin v. Massachusetts*, 505 U.S. 788 (1992), the plaintiffs challenged the apportionment of seats in the United States House of Representatives and, in particular, the decision by the Secretary of Commerce to allocate federal overseas employees to their home states for the purposes of apportionment. *Id.* at 795. Plaintiffs brought their claim under § 704 of the APA. As provided by the relevant statutes, the apportionment resulted from a two-stage process: first, the Secretary of Commerce, within 9 months of the census date, transmitted to the President a report containing a tabulation of total populations of the states; second, the President

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[7] At oral argument, the Forest Service conceded that the word "direction" in Table 19 includes both the POC guidelines in the LRMP and the additional POC guidelines contained in the FMP.

transmitted to Congress a statement which listed the total number of people in each state and the number of representatives to which each state was entitled. *Id*. at 792. It was the President's statement which determined the number of representative's each state would receive. *Id*. at 798. The President, however, was not bound to adopt the numbers in the Secretary's report. *Id*. Rather, he was bound by the census itself, which at the time the Secretary submitted his report to the President, was still subject to correction. *Id*.

The Court in *Franklin* concluded that there was no "final agency action" under § 704 because the report made by the Secretary of Commerce to the President was "more like a tentative recommendation than a final and binding determination." *Id*. The Court went on to hold that because the President is not an "agency," the APA did not apply to his actions. *Id*. In contrast to the Secretary's report to the President in *Franklin*, the FMP at issue here contains decisions and policies which, as discussed above, are not merely "tentative recommendations" but rather, are to be followed by Forest Service Officials.

Ecology Center, Inc. v. United States Forest Services, 192 F.3d 922 (9th Cir. 1999) is also distinguishable from the facts here. 192 F.3d 922 (9th Cir. 1999). In that case, the plaintiffs challenged the failure of the Kootenai National Forest to complete required reports which were to contain monitoring data helpful to the Forest Service in evaluating the effects of its management practices. *Id*. at 924. The court held that there was no final agency action because "monitoring and reporting are only the steps leading to an agency decision, rather than the final action itself." *Id*. at 925. In contrast, the FMP does not merely provide monitoring data. Rather, it instructs Forest Service personnel regarding fire and fuels management practices, both prohibiting actions and authorizing (or even requiring) others.

For similar reasons, the decision in *Northcoast Environmental Center v. Glickman*, is distinguishable. 136 F.3d 660 (9th Cir. 1998). In that case, the district court held that a challenge to a Port Orford Cedar Action Plan ("the Action Plan") was premature because there was no final agency action, and moreover, the Action Plan was not a "major federal action" under NEPA. *Id*. at 668. The Ninth Circuit affirmed, relying mainly on the second ground, but also suggesting that the

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final agency action requirement was not met.[8] The holding of *Northcoast* does not apply to the facts here, however, because the Action Plan at issue in that case was of a very different nature from the FMP. The court in *Northcoast* described the Action Plan as follows:

> The Plan covers four main areas of concern: (1) inventory and monitoring; (2) research and administrative study; (3) public involvement and education; and (4) management. The management section of the POC Action Plan identifies the following tasks:
> (1) Continue to refine and update risk assessment model used in evaluating projects.
> (2) Develop strategies for the management of the following activities:
> -- Timber sales
> -- Road construction and management
> -- Reforestation and stand management
> -- Other potentially earth moving activities in stands where a significant component is Port-Orford cedar
> (3) Develop a system or method for sharing information.

Id. at 663. It is evident from the court's description of the Action Plan that it did not adopt particular strategies and rules governing POC practices – in contrast to the FMP – but instead, instructed Forest Service personnel to begin to *develop* such strategies, as well as to obtain data through monitoring and research and to solicit public input. Under those circumstances, the court agreed with the Forest Service that the Action Plan was only the "beginning of a planning process." *Id*. at 663. That is not the case here, where particular strategies are adopted in the FMP.

The Forest Service's reliance on *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990) is also misplaced. *See* Defendant's Motion at 19. In *Lujan*, the plaintiffs challenged what they called the "land withdrawal review program" of the Bureau of Land Management ("BLM"). 497 U.S. at 875. In particular, the plaintiffs argued that the BLM's decisions to reclassify various "withdrawn" public lands such that they could be acquired by private citizens would open these lands to mining activities and therefore, would destroy their natural beauty. *Id*. at 879. Proceeding under § 702 of the APA, the plaintiffs asserted that these actions by the BLM violated the Federal Land Policy and Management Act of 1976 ("FLMPA"), which required the preparation of land use plans for the use of public lands, and that the actions violated NEPA's requirement that an EIS be completed for all "major federal actions significantly affecting the quality of the human

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[8] The Ninth Circuit in *Northcoast* does not address the test for final agency action articulated in *Bennett*, which was decided the previous year.

environment." The Court, however, held that the actions characterized by the plaintiffs as a "land withdrawal program" were not "an 'agency action' within the meaning of § 702, much less a 'final agency action' within the meaning of § 704." *Id*. at 8890. The Court explained:

> The term "land withdrawal review program" (which as far as we know is not derived from any authoritative text) does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA. It is no more an identifiable "agency action" – much less a "final agency action" – than a "weapons procurement program" of the Department of Defense or a "drug interdiction program" of the Drug Enforcement Administration. As the District Court explained, the "land withdrawal review program" extends to, currently at least, "1250 or so individual classification terminations and withdrawal revocations."

Id. In a footnote, however, the Court made clear that its ruling would not prevent all programmatic challenges. Rather, the Court explained, "[i]f there is in fact some specific order or regulation, applying some particular measure across the board to all individual classification terminations and withdrawal revocations, and if that order or regulation is final, and has become ripe for review . . . it can of course be challenged under the APA by a person adversely affected."

Here, in contrast to *Lujan*, Plaintiffs challenge a plan contained in a single, authoritative document that purports to contain a fire and fuels management plan for the Forest. The FMP, in turn, adopts a number of new policies that are to be followed by Forest Service officials and which are currently in effect. Thus, it cannot be said that there is no "identifiable 'agency action,'" as was the case in *Lujan*. *Id*. Rather, that facts here fall under the rule stated in the footnote in *Lujan* that is discussed above.[9]

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[9] The decision cited by the Forest Service in its Supplemental Citation of Authority, *Tule River Conservancy v. Daniel Glickman*, Case No. CV-F-97-5208 (filed July 9, 2003), is not on point. In that case, the plaintiffs challenged an alleged plan by the Forest Service to create "defensible fuel profile zones" ("DFPZ's"). As evidence of the existence of such a plan, the plaintiffs pointed to a Biological Evaluation ("BE") that provided "an alternative proposed design to review proposed timber sales." Opinion at 10. The Court rejected the plaintiffs' reliance on the BE, however, noting that "[a]s an alternative design, the BE is characteristically tentative." *Id*. The court concluded that because the plaintiffs could not "identify a DFPZ 'plan' that was planned and implemented forestwide,"there was no final agency action. *Id*. Here, in contrast, the Forest Service has adopted a plan that is not tentative

Accordingly, the Court concludes that there is subject matter jurisdiction over Plaintiffs' NEPA claim because the issuance of the FMP constitutes "final agency action."

C. Major Federal Action under NEPA

The Forest Service also argues that even if there is subject matter jurisdiction over Plaintiffs' claim, it was reasonable for the Forest Service not to complete an EA or EIS because the FMP does not result in an "irreversible and irretrievable commitment of resources." Defendant's Motion at 23 (citing to *Connor v. Burford*, 848 F.2d 1441 (9th Cir. 1988)). Therefore, the Forest Service argues, the FMP is not a "major [f]ederal action" requiring completion of an EA or an EIS. *Id*.; *see also* 42 U.S.C. § 4332(2)(C) (providing that all agencies of the Federal Government shall complete an environmental impact statement for any "proposal for major [f]ederal action[] significantly affecting the quality of the human environment").[10] The Court disagrees.

In *Connor v. Burford*, the Ninth Circuit addressed the considerations which should govern decision-makers in determining the point at which an EIS is required:

> The purpose of an EIS is to apprise decisionmakers of the disruptive environmental effects that may flow from their decisions at a time when they "retain[ ] a maximum range of options. . . . Toward this end, the courts have attempted to define a "point of commitment" at which the filing of an environmental impact statement is required. . . . Our circuit has held that an EIS must be prepared before any irreversible and irretrievable commitment of resources.

848 F.2d at 1446. In applying this approach, courts are mindful of the need to avoid creating a "catch-22" situation in which NEPA analysis is not required until a point when environmental review cannot be conducted effectively. *See Northcoast Environmental Center*, 136 F.3d at 670 (rejecting plaintiffs' "catch-22" argument regarding need for an EIS on a POC action plan because

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but rather, makes a number of new decisions regarding fire management policy, as discussed above.

[10] The Forest Service explains in a footnote that where it is not clear whether a proposal for major federal action will have a significant environmental impact, an EA should be completed to determine whether an EIS is required. Defendant's Motion at 23, n. 18 (citing 40 C.F.R. § 1501.4). However, because the Forest Service takes the position that there is no "major federal action" – and therefore, neither an EA nor an EIS is required – it does not reach the question of whether the FMP significantly affects the environment.

"[t]here is no reason plaintiffs cannot challenge the sufficiency of an agency EIS when a discrete agency action is called for").

The Forest Service argues that the FMP does not satisfy the "point-of-commitment" test because it does not commit the Forest Service to do anything. Defendant's Motion at 24. Rather, the Forest Service argues, until site-specific action is undertaken, the Forest Service "maintains absolute discretion to prevent or commit the use of resources for any of the options set out in the Six Rivers Fire Plan." *Id*. As an example, the Forest Service points to the strategies for fuels management contained in the FMP. The FMP allows for mechanical treatment and prescribed burns, among other things, but does not identify any particular project or area where either strategy must be pursued. The Forest Service argues that there will be no commitment of resources with respect to mechanical treatment and prescribed burns until particular projects are developed and it is at that point that NEPA analysis will be required. A second example offered by the Forest Service is wildland fire suppression. According to the Forest Service, there is no commitment of resources with respect to fire suppression until a fire actually occurs. At oral argument, the Forest Service conceded that at that point, it is impossible to complete an EA or EIS because of the emergency conditions in which decisions are made.

Without reaching the persuasiveness of the Forest Service's first example, the Court rejects the Forest Service's argument based on the policies adopted in the FMP with respect to fire suppression. In particular, the Court finds that with respect to fire suppression policies, the FMP satisfies the point-of-commitment test. The Court's conclusion is supported by a line of cases that address when an EIS is required where an "overall plan," rather than an "individual lease, license or contract" is at issue. *See Environmental Defense Fund, Inc. v. Andrus*, 596 F.2d 848, 851 (9th Cir. 1979).[11]

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[11] In reaching its conclusion, the Court does not, however, rely on Plaintiffs' argument that an EIS is required because the FMP is, in essence, a de facto amendment to the LRMP. In making this argument, Plaintiffs rely heavily on *House v. United States Forest Service*, 974 F. Supp. 1072 (E.D. Ky. 1992) and *ONRC v. Forsgren*, 252 F. Supp. 2d 1088 (D. Or. 2003).

In *House*, the plaintiffs challenged a proposed timber sale, arguing that the project was approved on the basis of three policies which should have been subjected to public comment under the NFMA because they amounted to de facto amendments of the Forest Plan. 974 F. Supp. at 1034. The Court

The Supreme Court decision that set forth the basic framework for this line of cases is *Kleppe v. Sierra Club*, 427 U.S. 390 (1976). In *Kleppe*, the Supreme Court addressed whether a number of agencies responsible for mining-related activities, such as issuing coal leases and approving mining plans, were required to complete an EIS to address the threat of coal related operations for the Northern Great Plains Region before permitting any further development of the region. *Id*. at 395. The Court held that an EIS was not required because no regional proposal or recommendation had been adopted. *Id*. at 399. Rather, the only proposals for action were at either the local or the national level. *Id*. The Court explained that "[a]bsent an overall plan for regional development, it is impossible to predict the level of coal-related activity that will occur in the region identified . . . and thus, impossible to analyze the environmental consequences and the resource commitments involved in, and the alternatives to such activity." *Id*. at 402. The Court continued, "[a] regional plan would define fairly precisely the scope and limits of the proposed development of the region." *Id*.

In *Port of Astoria v. Hodel*, the Ninth Circuit applied *Kleppe* to a challenge brought to a regional policy under NEPA. 595 F.2d 467 (9th Cir. 1979). There, the plaintiffs asserted that an EIS should have been completed in connection with the adoption by the Bonneville Power

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agreed. Specifically, the Court found that the three policies amounted to "significant" amendments to the LRMP and therefore, were required to undergo the same public comment as was the LRMP itself. *Id*. (citing to 36 C.F.R. § 219.10(f) (requiring that any "significant" amendment to an LRMP must undergo the same procedure as the LRMP itself) and 16 U.S.C. § 1604(d) (requiring public participation in the development, review and revision of land management plans)).

In *Forsgren*, the plaintiffs challenged three timber sales which were approved on the basis of mapping directions regarding lynx habitat and a document regarding Lynx conservation strategies, neither of which had been subjected to public comment. 252 F. Supp. 2d at 1099. The mapping direction instructed regional foresters and supervisors to apply a narrower definition than previously had been applied to Lynx habitat. *Id*. at 1092. As a result, the territory in which lynx conservation strategies were required was reduced. *Id*. The plaintiffs argued that the two documents amounted to "significant" amendments of the forest plan and therefore, that an EIS had to be prepared as to these documents. *Id*. The court in that case agreed. *Id*.

The Court is not persuaded by Plaintiffs' de facto amendment argument because it is based upon the NFMA rather than NEPA. Thus, in both *House* and *Forsgren*, the courts relied on the requirement under the NFMA that an EIS be prepared in connection the issuance of an LRMP and any "significant" amendments to the LRMP. However, Plaintiffs cite to no authority which holds that a "significant" amendment to an LRMP must also be "major Federal action" under NEPA. Thus, Plaintiffs' de facto amendment argument does not shed light on the question of whether the FMP constitutes a proposal for "major federal action" under NEPA. Nor can Plaintiffs rely directly on the NFMA requirement that an EIS must be completed for significant amendments to the LRMP, as they have declined to assert a claim under the NFMA.

Administration ("BPA") of a regional policy for the development and distribution of power resources called "Phase 2." *Id*. at 473-474. Under Phase 2, one contract to supply electrical power had been signed, and more were envisioned. *Id*. at 478. The defendants argued that an EIS on Phase 2 was premature because only one contract had been signed while the remaining contracts were "mere contingency." *Id*. The court, however, disagreed, holding that because Phase 2 was a "long-range regional policy with definite goals and fixed roles for participants," an EIS was required. *Id*. The Court explained its holding as follows:

> It is to be noted . . . that BPA and its large industrial customers are already operating under letter agreements that are, in effect, industrial firm power contracts. In addition, as far as the record shows, BPA has no intention of abandoning its industrial sales policy or the industrial firm power rate and is prepared to execute industrial firm power contracts with its major industrial customers. In these circumstances, NEPA does not permit delaying assessment of environmental factors until BPA is faced with the reality of executed contracts and the necessity of supplying power to industry until 1994. Rather, the assessment should occur at an early stage when alternative courses of action are still possible and environmental damage can be mitigated.

Id. at 478.

The Ninth Circuit reached a similar result in *Environmental Defense Fund v. Andrus,* 596 F.2d 848 (9th Cir. 1979). In *Andrus*, the Ninth Circuit considered whether or not completion of an EIS was required in connection with the adoption of a regional plan for marketing water. *Id*. at 851. The defendants argued that no EIS was required because although the agency had entered into a number of option contracts for the sale of water pursuant to the regional plan, it was uncertain when (if ever) the options would be exercised. *Id*. The court rejected the defendants' position. *Id*. First, the court distinguished the facts from *Kleppe*. In particular, whereas in *Kleppe* there had been "no overall plan for regional development," here there was an overall plan. *Id*. The court went on to state that "[i]n focusing on the uncertainty of industrial use if and when the option contracts are exercised, the court ignored the definite federal action already taken in major commitment of project water to industrial use." *Id*. The court concluded as follows:

> Here the Secretary of Interior has no intention of abandoning plans for marketing industrial water and is prepared to execute water option contracts. NEPA does not permit delay in assessing the environmental impact of the marketing plan.

Id. at 852.

Finally, in *Kern v. United States Bureau of Land Management*, 284 F.3d 1062 (9th Cir. 2002), the Ninth Circuit revisited the POC guidelines addressed in the *Northcoast Environmental*. The court held that because the POC guidelines had been incorporated into a regional management plan, an EIS was required. *Id*. at 1072. The court rejected the defendant's argument that the guidelines were not a proposal for major federal action because there had been no irreversible or irretrievable commitment of resources, explaining its conclusion as follows:

> An agency may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from an RMP merely by saying that the consequences are unclear or will be analyzed later when an EA is prepared for a site-specific program proposed pursuant to the RMP. "[T]he purpose of an [EIS] is to evaluate the possibilities in light of current *and contemplated* plans and to produce an informed estimate of the environmental consequences.... Drafting an [EIS] necessarily involves some degree of forecasting." . . . If an agency were able to defer analysis . . . of environmental consequences in an RMP, based on a promise to perform a comparable analysis in connection with later site-specific projects, no environmental consequences would ever need to be addressed in an EIS at the RMP level if comparable consequences might arise, but on a smaller scale, from a later site-specific action proposed pursuant to the RMP.

Id. (citations omitted)(emphasis in original).

Here, as in *Port of Astoria*, *Andrus,* and *Kern*, the Forest Service has adopted a forest-wide plan that commits the Forest Service to follow a number of concrete policies related to fire suppression that may have a significant environmental impact. As discussed above, for example, these policies prohibit WFU under certain conditions, authorize the use of potentially-infected bleach-treated water, authorize the use of roads that have been closed to protect against the spread of POC root disease, and require an aggressive fire suppression response in the Highway 199 corridor. These polices are already in effect and there is no evidence in the record that the Forest Service has any intention of abandoning them. *See Port of Astoria*, 595 F.2d at 478. Moreover, as the Forest Service concedes, it is impossible to conduct an environmental review of site-specific decisions in response to particular fires *prior* to implementing those decisions because of the emergency conditions under which such decisions are made. Thus, were the Court to adopt the Forest Service's position, NEPA analysis could only be conducted *after* the Forest Service responded to particular fires, at a point when alternative courses of action are not available and the impact of the policies cannot be mitigated. Such a result is contrary to the purposes of NEPA and is not supported by the case law. *See id.*

The Court also rejects the Forest Service's reliance on *Friends of Southeast's Future v. Morrison*, 153 F.3d 1059 (9th Cir. 1998). In *Friends*, the plaintiffs asserted that the Forest Service was required to complete an EIS in connection with a tentative operating schedule listing seven proposed logging projects that was created in consultation with a timber buyer with whom the Forest Service had a long term contract. *Id*. at 1061. The Court disagreed, finding that there was no "irrevocable and irretrievable commitment" of resources. *Id*. at 1063. The court held that the Tentative Operating Schedule was not an irretrievable commitment of resources because the schedule reserved to the government the "absolute right to prevent the use of the resources in question." *Id*. *Friends* differs from the facts here, however, in that it does not involve an overall plan adopting particular policies and strategies for the entire forest but rather, a specific non-binding contract for the sale of timber. Therefore, the result in *Friends* does not apply to the facts here.

The Court concludes that the FMP is a "proposal for major federal action" that may have a significant environmental impact.[12] Accordingly, the Forest Service's failure to complete an EA or an EIS in connection with the FMP was unreasonable.

IV. CONCLUSION

For the reasons stated above, the Court finds for Plaintiffs and against Defendant on liability and concludes that Defendant violated NEPA by failing to prepare an Environmental Assessment or an Environmental Impact Statement in connection with the issuance of the Six Rivers National Forest Fire Management Plan. The parties are directed to meet and confer regarding the remedy

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[12] As discussed above, agencies are required to complete an EA where it is unclear whether a proposal for major federal action will result in a "significant environmental impact." 40 C.F.R. § 1501.4. Unless the agency finds, on the basis of the EA, that there is "no significant impact," an agency is required to prepare an EIS. *Id*. Here, the parties do not address the "significant impact" requirement separately from the "major federal action" requirement. Rather, the Forest Service asserts that there can be no significant impact because there is no major federal action. The Forest Service does not argue, however, that if the policies adopted in the FMP *are* proposal for major federal action, they *could not* have a significant impact. Indeed, the Forest Service could not seriously argue that there is no possibility that the decisions discussed above, such as allowing the use of potentially infected, bleach treated water for fire suppression, would have a significant impact on the environment.

phase of this case and file an updated Joint Case Management Conference Statement on or before **September 19, 2003**. The Court will hold a Further Case Management Conference on **September 26, 2003, at 1:30 p.m.** This closes Docket Nos. 15 and 31.

IT IS SO ORDERED.

Dated: September 5, 2003

JOSEPH C. SPERO
United States Magistrate Judge